Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 26 April 2012 [1]

Case C-138/11

Compass-Datenbank GmbH
v
Republik Österreich

(Reference for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Competition — Abuse of a dominant position under Article 102 TFEU — Concept of 'undertaking' — Re-use of public sector data — Absolute prohibition on re-utilisation of data on public undertakings register — Refusal by a Member State to licence bulk transfer of data for commercial re-exploitation — Identification of upstream market — Essential facilities — Refusal to supply — Directive 68/151/EEC — Directive 96/9/EC — Directive 2003/98/EC)

I – Introduction

1. In this case guidance is sought by the Oberster Gerichtshof (Supreme Court of Austria) on whether the Austrian State is acting as an 'undertaking' in the sense of Article 102 TFEU by prohibiting both re-use of data contained on its public register of businesses ('the undertakings register') and the commercialisation of this data to create a more comprehensive business information service. If it is, the Court is then asked to provide guidance on whether the so-called essential facilities doctrine is applicable. The doctrine relates to situations where control of a resource by an undertaking on the upstream market creates a dominant position in the downstream market.

2. These questions have arisen in a context in which principles of EU law concerning the legal protection of databases, the keeping of public registries of companies by Member States, and the re-use of public sector information are relevant. This is so because, on the one hand, Austria is relying on a directive which imposes an obligation on it to maintain a register concerning information about companies, another on legal protection of databases and a third on re-use of public information. On the other hand, Compass-Datenbank, the company which has launched this claim, has turned to the directive on the re-use of public information to support arguments it has made concerning abuse of a dominant position, and more specifically the 'essential facilities' doctrine.

1 — Original language: English.

II – EU law

Directive 68/151/EEC[2]

3. Article 3 of Directive 68/151 provides that;

‘1. In each Member State a file shall be opened in a central register, commercial register or companies register, for each of the companies registered therein.

2. All documents and particulars which must be disclosed pursuant to Article 2 shall be kept in the file or entered in the register; …

3. A copy of the whole or any part of the documents or particulars referred to in Article 2 must be obtainable on application. As from 1 January 2007 at the latest, applications may be submitted to the register by paper means or by electronic means as the applicant chooses.

As from a date to be chosen by each Member State, which shall be no later than 1 January 2007, copies as referred to in the first subparagraph must be obtainable from the register by paper means or by electronic means as the applicant chooses …

The price of obtaining a copy of the whole or any part of the documents or particulars referred to Article 2, whether by paper means or by electronic means, shall not exceed the administrative cost thereof.

Paper copies shall supplied shall be certified as “true copies”, unless the applicant dispenses with such certification. Electronic copies supplied shall not be certified as “true copies”, unless the applicant explicitly requests such a certification …

4. Disclosure of the documents and particulars referred to in paragraph 2 shall be effected by publication in the national gazette appointed for that purpose by the Member State, either of the full text or of a partial text, or by means of a reference to the document which has been deposited in the file or entered in the register. The national gazette appointed for that purpose may be kept in electronic form …

5. The documents and particulars may be relied on by the company as against third parties only after they have been disclosed in accordance with paragraph 4, unless the company proves that the third parties had knowledge thereof.

However, with regard to transactions taking place before the 16th day following the disclosure, the documents and particulars shall not be relied on as against third parties who prove that it was impossible for them to have had knowledge thereof …’

Directive 96/9/EC[3]

4. Recitals 40 and 41 of Directive 96/9 state as follows;

2 — First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968(I), p. 41), as amended by Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies (OJ 2003 L 221, p. 13).

3 — Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

‘(40) Whereas the object of [the] *sui generis* right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy;

(41) Whereas the objective of the *sui generis* right is to give the maker of a database the option of preventing the unauthorised extraction and/or re-utilisation of all or a substantial part of the contents of that database; whereas the maker of a database is the person who takes the initiative and the risk of investing; whereas this excludes subcontractors in particular from the definition of maker.’

5. Article 7 of Directive 96/9 entitled ‘Object of protection’ under chapter III ‘*Sui generis* right’ provides:

‘1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

(a) “extraction” shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b) “re-utilisation” shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by online or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

…

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence …

5. The repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.’

Directive 2003/98/EC[4]

6. Recitals 8 and 9 of Directive 2003/98 state:

‘(8) A general framework for the conditions governing re-use of public sector documents is needed in order to ensure fair, proportionate and non-discriminatory conditions for the re-use of such information. Public sector bodies collect, produce, reproduce and disseminate documents to fulfil their public tasks. Use of such documents for other reasons constitutes a re-use. Member States’ policies can go beyond the minimum standards established in this Directive, thus allowing for more extensive re-use.

4 — Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ 2003 L 345, p. 90).

(9) This Directive does not contain an obligation to allow re-use of documents. The decision whether or not to authorise re-use will remain with the Member States or the public sector body concerned … Public sector bodies should be encouraged to make available for re-use any documents held by them. Public sector bodies should promote and encourage re-use of documents, including official texts of a legislative and administrative nature in those cases where the public sector body has the right to authorise their re-use.'

7. Recital 22 of Directive 2003/98 states that '… The Directive does not affect the existence or ownership of intellectual property rights of public sector bodies, nor does it limit the exercise of these rights in any way beyond the boundaries set by this Directive … Public sector bodies should, however, exercise their copyright in a way that facilitates re-use.'

8. Article 1(1) of Directive 2003/98 entitled 'Subject matter and scope' states;

'This Directive establishes a minimum set of rules governing the re-use and the practical means of facilitating reuse of existing documents held by public sector bodies of the Member States.'

9. Article 2(4) of Directive 2003/98 defines re-use as 'the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced. Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use'.

10. Article 3 of Directive 2003/98 entitled 'General principle' states;

'Member States shall ensure that, where the re-use of documents held by public sector bodies is allowed, these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in Chapters III and IV. Where possible, documents shall be made available through electronic means.'

III – The dispute in the main proceedings, the relevant national law, and the questions referred for a preliminary ruling

A – *The undertakings register*

11. Under Articles 1 and 2 of the Firmenbuchgesetz ('FBG')[5] businesses are required to place certain information on the undertakings register which, under the same provisions, is also to be made available to the public. Pursuant to Article 3, the information includes the names of the undertakings, their legal form, their seat, an indication of their area of activity, their branches, the names, dates of birth, and scope of authority of those who act as representatives, along with details of any liquidation proceedings or the opening of any insolvency proceedings.

12. Up to 1990, the information kept by the Austrian State was accessible to the public through the courts where the undertakings register was kept. It is still possible to consult the undertakings register through local and regional courts (Berzirksgerichte) or through notaries (Articles 33 and 35 of the FBG) for a statutory court fee.

5 — BGBl. Nr. 10/1991.

13. From 1 January 1991 the undertakings register was computerised, and by the end of 1994, all the business data had been re-recorded. As from 1993 searches could be made by members of the public via interactive videotext, and since 1999 it has been possible to make online searches of the undertakings register on the internet. Pursuant to Article 34 of the FBG, everyone is authorised to rapid access to consult the information on the undertakings register by electronic transmission, to the extent that technology and the availability of personnel so permit.

14. Public access to the undertakings register, by electronic means, changed in 1999 when Austria awarded, originally, five billing agencies (Verrechnungsstellen) the task of providing access to the undertakings register via the internet.[6] These agencies levy a statutory court fee and charge remuneration for their services. The court fees due for rapid access consultations and consultations in general are fixed by the regulation concerning the database of undertakings registers (Firmenbuchdatenbankverordnung; 'FBDV'[7]). The court fees are collected by the billing agencies and forwarded to the State. They are calculated by reference to the nature of the information consulted. The separate remuneration for the service provided by the billing agencies has to be approved by the Ministry of Justice.

15. The database of the undertakings register is a protected database. The owner of the *sui generis* right to the database is the Austrian State. According to Article 4(2) of the FBDV, authorisation to consult the undertakings register does not confer a right to engage in acts of distribution ('prohibited re-utilisation'). This is reserved to the Austrian State as maker of the database, in conformity with the relevant copyright law provisions that were adopted in order to transpose Directive 96/9.[8]

B – *Compass-Datenbank's database*

16. For more than 130 years Compass-Datenbank GmBH ('Compass-Datenbank') and its legal predecessors have had at their disposal collections of information kept by the Austrian State relating to businesses and undertakings. From 1995 they began operating a trade and industry database, accessible via the internet, and which drew in part from this information.

17. Compass-Datenbank's database contains a range of information that is additional to that appearing in the undertakings register. It includes information about shareholdings, telephone and fax numbers, email addresses, areas in which the undertakings listed trade, along with a brief description of their activities, and banks in which accounts are held. In order to run its information service, Compass-Datenbank needs to have daily updates of the data recorded in the undertakings register, which is supplemented by its own research.

18. Until December 2001 Compass-Datenbank received this data from the Austrian federal computer centre with no restriction as to its re-utilisation. Compass-Datenbank was able to receive the information in its capacity as the publisher of the Zentralblatt für Eintragungen in das Firmenbuch der Republik Österreich (Central Journal for Entries in the Business Undertakings Register of the Republic of Austria). Compass-Datenbank re-utilised the same data for its own trade and industry database.

6 — The representative of Austria explained at the hearing that this solution was adopted for the sole reason that there was no state infrastructure for online invoicing and payments relating to internet consultations of the undertakings register

7 — BGBl. II Nr. 240/1999.

8 — According to the written observations of Compass-Datenbank, prior to 1998 the Austrian State did not enjoy the protection of copyright law with respect to public registers.

C – National proceedings

19. In 2001 the Austrian State instituted proceedings before the Handelsgericht Wien (Commercial Court, Vienna) seeking, among other things, an injunction against Compass-Datenbank to prohibit it from using data from the undertakings register, in particular by storage, reproduction or transmission to third parties. By a decision of 9 April 2002 the Oberster Gerichtshof granted, in part, a safeguard application to this effect and directed Compass-Datenbank, pending final decision, to refrain from re-using the undertakings register to update its own trade and industry database and, in particular, to refrain from storing or otherwise reproducing data from the undertakings register in order to pass it on to third parties, making it accessible to them or supplying information from it, in so far as Compass-Datenbank had not received such data in return for reasonable remuneration transferred to the Austrian State. The order for reference does not state whether the Austrian courts subsequently made a definitive ruling in these proceedings.

20. However, despite this, the representative of Compass-Datenbank explained at the hearing that they have continued to receive undertakings register data, but against remuneration that Austria considers to be too low.

21. A different set of proceedings were launched by Compass-Datenbank on 21 December 2006, in which it asked for an order requiring the Austrian State to put at the disposal of Compass-Datenbank, in conformity with the Federal law on re-use of information held by public bodies (Bundesgesetz über die Weiterverwendung von Informationen öffentlicher Stellen, 'IWG'),[9] certain documents available on the undertakings register, subject to payment of an appropriate fee. More specifically, Compass-Datenbank requested access to documents in the form of extracts from the undertakings register containing updated data concerning the legal subjects registered therein, or who had de-registered on the previous day, and also extracts from the undertakings register containing historical data.

22. In the course of the national proceedings it was established that Compass-Datenbank cannot derive any rights from the IWG. However, it was found that there might be arguments on which the company could rely that were grounded in competition law. After various stages in different Austrian courts, the case reached the Oberster Gerichtshof, which found it necessary to send the following three questions to the Court for a preliminary ruling:

'(1) Is Article 102 TFEU to be interpreted as meaning that a public authority acts as an undertaking if it stores in a database (business undertakings register) the information reported by undertakings on the basis of statutory reporting obligations and allows inspection and/or printouts to be made in return for payment, but prohibits any more extensive use?

If the reply to Question 1 is in the negative:

(2) Does a public authority act as an undertaking in the case where, in reliance on its *sui generis* right to protection as the producer [maker] of a database, it prohibits uses which go beyond that of allowing inspection and the creation of printouts?

9 — BGBl. I Nr. 135/2005. This issue is not explained in detail in the order for reference, and neither is the relevant provision I have quoted. However, I note that Article 7 of the IWG provides that the remuneration charged by authorities for re-use of public sector data should not exceed the related costs, with a reasonable profit margin added.

If the reply to Questions 1 or 2 is in the affirmative:

(3) Is Article 102 TFEU to be interpreted as meaning that the principles laid down in the judgments in *RTE and ITP* ("*Magill*") and in *IMS Health* [10] ("essential facilities doctrine") are also to be applied if there is no "upstream market" because the protected data are collected and stored in a database (business undertakings register) in the course of a public-authority activity?'

23. Compass-Datenbank, the Austrian Government, Ireland, the Netherlands Government, the Polish Government, the Portuguese Government, and the European Commission have submitted written observations. Compass-Datenbank, the Austrian Government, Ireland, and the European Commission, participated at the hearing of 2 February 2012.

IV – Analysis

A – *Preliminary observations*

1. The role of the billing agencies

24. The observations of the parties show that, as a preliminary issue, the role of the billing agencies needs to be analysed, particularly with respect to how this affects the appreciation of whether the Austrian State is engaged in economic activities.

25. As explained above in point 14, in 1999 a method of accessing the undertakings register was established through billing agencies. They provide online access, in return for payment, to the undertakings register. The representative of Austria explained at the hearing that, presently, any undertaking fulfilling the required service and performance qualities can be accepted as a billing agency. There are now 10 billing agencies involved in this task, one of which is a member of the same group of companies as Compass-Datenbank. [11]

26. The billing agencies establish, via the internet, the connection between the undertakings register and the customer. They are prohibited from re-using the undertakings register data or from altering the content or presentation of the information that has been transmitted. They are also precluded from expanding the content by advertising. Customers of the billing agencies are likewise prohibited from re-utilising data in such a way as to infringe Austria's *sui generis* rights in relation to the undertakings register. This means that the prohibition on such re-utilisation that is covered by the *sui generis* right is absolute and upheld by Austria in a non-discriminatory manner.

27. It is important to bear in mind that, by the orders sought before the national courts, Compass-Datenbank is seeking from the Austrian State a right to bulk transfer of fresh data recorded in the undertakings register, for reasonable remuneration, and with the right to re-utilise it in order to include the data in Compass Datenbank's information service and distribute it.

28. The purpose of procuring such an order is to allow Compass-Datenbank to provide a service that builds upon the data that is already accessible to everybody through the billing agencies. As was pointed out by Compass-Datenbank at the hearing, it wishes to provide more than a mere copy of the information supplied by the billing agencies. It wishes to add value to this information by

10 — Joined Cases C-241/91 P and C-242/91 P [1995] ECR I-743 and Case C-418/01 [2004] ECR I-5039.

11 — At the hearing it was stated that this billing agency is a sister company of Compass-Datenbank.

supplementing it with other material. Moreover, its business model requires it to have access to fresh and up-to-date data for a price that is lower than the statutory fee payable through billing agencies. This is what is sought in the national proceedings initiated by Compass-Datenbank, which has proposed a certain fee that it considers as the appropriate remuneration payable to the Austrian State.

29. Maintaining a clear perception of the role of the billing agencies is important for two reasons. First, in determining whether a public authority acts as an 'undertaking' for the purposes of EU competition law, an analysis is required of the individual activities of the public authority concerned. The authority will be classified as an 'undertaking' to the extent to which those activities are 'economic' in nature. [12] It is thus the activities of the Austrian State, rather than those of the billing agencies, that are relevant to determining the extent to which Article 102 TFEU is applicable to the dispute to hand.

30. The distinction is also important because, in order to determine whether an undertaking is abusing its dominant position by refusing to supply a product or service, it is necessary to start with identification of the market on which the undertaking concerned has a dominant position. This analysis is therefore directed at the Austrian State rather than at the billing agencies.

31. In my opinion the correct analysis of the arrangements is as follows. Austria is issuing public service concessions to the billing agencies. I have reached this conclusion because the billing agencies have, subject to the supervision of the Ministry of Justice, a certain limited freedom to set the price of online access to the undertakings register (the remuneration that is supplementary to the statutory court fee) and they receive that remuneration from third parties and not from the contracting authority that awarded them the contracts. [13] The commercial risks relating to online access to the undertakings register is born by the billing agencies, which also suggests that Austria has merely granted the agencies a concession. [14]

32. While it is established that the refusal of a Member State to supply, by way of a service concession, an exclusive licence is subject to fundamental rules of the EU Treaty and the FEU Treaty in general, including Article 56 TFEU and, in particular, the principles of equal treatment and non-discrimination on grounds of nationality, and the consequent obligation of transparency, [15] the obligations on Member States go no further. Public service concession contracts are not governed by any of the public procurement directives. [16]

33. I would note, in passing, that there may be a question as to whether the statutory court fees and/or the supplementary remuneration applied by the billing agencies exceed the permissible 'administrative cost' for obtaining copies of documents or particulars that is referred to in Article 3(3) of Directive 68/151. However, whether Austria is acting inconsistently with Directive 68/151 is not relevant to the question whether Austria is acting as an undertaking [17] by refusing bulk access and re-utilisation of the data in issue in these proceedings.

12 — See Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Joined Cases C-264/01, C-306/01, C-354/01, C-355/01 *AOK-Bundesverband and Others* [2004] ECR I-2493, paragraph 59; C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43, paragraph 18.

13 — See Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraphs 53 to 57, and Case C-274/09 *Privater Rettungsdienst und Kranentransport Stadler* [2011] ECR I-1335, paragraphs 24 and 25. According to EU secondary legislation, a service concession is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

14 — *Eurawasser*, paragraphs 67 and 68; *Privater Rettungsdienst und Kranentransport Stadler*, paragraph 26.

15 — Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraph 39.

16 — *Sporting Exchange*, paragraph 39.

17 — On the other hand, the question as to whether the statutory fees for consultation of the undertakings registry set by Austria, relying on its *sui generis* right to the data bank, are set so high that they render the activity economic in nature, requires more detailed consideration.

34. Moreover, although the activities of the billing agencies have to be viewed as being clearly economic, this issue is also irrelevant to the question of whether Austria has behaved abusively in refusing to issue a bulk access licence to Compass-Datenbank, or allow re-utilisation of undertakings register data. This is so because the billing agencies are active on a separate and unrelated market to the market on which Compass-Datenbank wishes to trade. The former are active on the market in online access to the undertakings register. In other words, they simply provide an electronic pathway and de-centralised customer interface for the information held by the Austrian State.

35. Compass-Datenbank is not precluded from this market but has access to it on non-discriminatory terms. As I have already mentioned, one of the companies within its group is in fact a billing agency active on this market. Compass-Datenbank is not seeking an entitlement to re-utilise the information from the billing agencies, who are equally precluded from re-utilising it, but an alternative way of accessing this data. Compass-Datenbank is claiming abusive behaviour on the part of Austria in preventing the emergence, or continuation, of the market in the commercialisation of this data.

2. Relevance of the Directives

36. A further preliminary issue which needs to be addressed has arisen on the basis of the written observations of the Austrian Government and the Netherlands Government. It relates to how, if at all, obligations imposed on Austria by Directives 68/151 and 2003/98 impact on determining whether it is engaged in economic activities in a sense that is relevant for the applicability of Article 102 TFEU.

37. It is beyond doubt that in the event of a direct conflict between a directive and any primary provision of the TEU or the TFEU, including Article 102 TFEU, the latter prevails. However, in the European Union as in any polity based on the principles of constitutionalism and rule of law, it is the task of the legislature to consider and weigh up the more abstract and general rules and principles embodied in the constitution, or in the case of the European Union, in the Treaties.[18]

38. In conformity with the approach employed, in particular, by the Netherlands Government in its written observations, the existence and content of directives are as relevant as national legal provisions in determining whether a Member State is engaged in economic activities, which are governed by Article 102 TFEU, as opposed to falling outside it as an exercise of public power. The test to determine whether a public authority is engaged in economic activities entails consideration of their nature, aim and *rules to which they are subject.*[19] This includes any relevant directives, as was illustrated in *Selex Sistemi Integrati* v *Commission*,[20] where a directive was pertinent to the assessment of Eurocontrol's activities as either economic or public in nature.

39. Therefore, rather than putting the directives to one side on the basis of the hierarchy of norms, in my opinion they form an important part of the assessment which the Court has been asked to undertake. Both Directives 68/151 and 2003/98, along with Directive 96/9, contain provisions that are relevant to determining whether Austria, by prohibiting re-utilisation of undertakings register data and refusing bulk access licensing, is engaged in economic activities or exercising public powers.

18 — For this reason, EU legislative acts cannot be set aside unless the Court has confirmed the existence of incompatibility with the Treaties in the course of proceedings where the validity of a secondary measure is examined. See Case 314/85 *Foto-Frost* [1987] ECR 4199.

19 — See *SAT Fluggesellschaft* v *Eurocontrol*, paragraph 30. The emphasis is mine.

20 — Case T-155/04 ECR [2006] II-4797, appealed in C-113/07 P *Selex Sistemi Integrati* v *Commission* [2009] ECR I-2207.

B – *First and second preliminary questions*

1. The scope of the questions referred

40. The Court has been asked to determine whether, in the circumstances of this case, Austria is an 'undertaking' for the purposes of Article 102 TFEU, and secondly, whether, the 'essential facilities' doctrine is relevant to resolving the dispute, in the purported absence of an upstream market.

41. That being so, in my opinion the task before the Court is confined to providing the national court with guidance as to whether Austria is exercising public powers or prerogatives to the exclusion of economic activities,[21] or whether, to the contrary, at least one of the activities in question is an economic activity that is divisible from Austria's public activities.[22] If the latter is the case, the Court is asked to provide guidance on the parameters of the law on abuse of a dominant position, in the form of refusal to supply,[23] and more particularly the circumstances in which refusal to licence material protected by a *sui generis* right to a database is caught by Article 102 TFEU.

42. I will consider the first two of these points by taking the first and second preliminary questions together. I will discuss the last point concerning refusal to license by considering the third preliminary question separately.

43. As the Polish Government has pointed out, these issues require the Court to consider three specific activities in the light of its case-law on the circumstances in which a public authority acts as an undertaking, thereby becoming bound by EU rules prohibiting abuse of a dominant position under Article 102 TFEU. Those acts are:

(i) storing in a database (the undertakings register) information provided by businesses on the basis of statutory reporting obligations;

(ii) allowing inspection and/or printouts to be made of the undertakings register in return for payment; and

(iii) prohibiting re-utilisation of the information contained in the undertakings register.

44. Before addressing these issues, it is important to observe that the relevant Austrian legislation reflects a restrictive policy as to the possibilities for third parties to provide business information services by processing the undertakings register data. Other Member States, such as Ireland, have adopted more liberal approaches, and permit, for example, licences enabling bulk access and re-use for commercial purposes of such data. Whatever the merits of these different approaches, EU law will only limit policy choices made by a Member State in circumstances in which it is acting as an undertaking.

21 — See *SAT Fluggesellschaft* v *Eurocontrol*, paragraph 30; C-343/95 *Calì & Figli* v *Servizi Ecologici Porto di Genova* [1997] ECR I-1547, paragraphs 22 to 23; and C-113/07 P *Selex Sistemi Integrati* v *Commission*, paragraph 70.

22 — See *SAT Fluggesellschaft* v *Eurocontrol*, paragraph 28; Case T-128/98 *Aéroports de Paris* [2000] ECR II-3929, paragraph 108, the principle of separability was affirmed by the Court of Justice in Case C-82/01 P *Aéroports de Paris* [2002] ECR I-9297, paragraph 81.

23 — See Case 53/87 *CICRA and Maxicar* [1988] ECR 6039; Case 238/87 *Volvo* [1998] ECR 6211; *Magill*; Case C-7/97 *Bronner* [1998] ECR I-7791; *IMS Health*; Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601.

2. Storing of information in the undertakings register

45. In competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. [24] This includes the Member States. It is of no importance that the Member State is acting directly through a body forming part of the State's administration or by way of a body on which it has conferred special or exclusive rights. [25] Rather, it is necessary to consider the nature of the activities carried on by the public undertaking or body in question. [26]

46. Public entities will only be precluded from qualifying as an undertaking if they exercise public powers or prerogatives to the exclusion of economic activities. [27] It is necessary to give separate consideration to each activity undertaken by the public sector entity in question. If these activities are divisible, a public sector entity will amount to an undertaking to the extent that it engages in economic activities. [28] Economic activities consist, according to the case-law, of any offering of goods and services on the market. [29]

47. It is beyond doubt that the storing in a database, in this case the undertakings register, of information provided by undertakings on the basis of statutory reporting obligations is by its nature, aim and the rules to which it is subject connected to the exercise of public powers. [30]

48. The storage of data on the undertakings register, on the basis of a legal obligation to do so, is an activity undertaken in the general interest of legal certainty. The legal subjects referred to in Article 2 of the FBG are obliged to provide the information mentioned in Article 3 of the FBG in order to comply with the requirements of registration provided under Articles 4, 5, 6 and 7. They are also required to communicate without delay any changes to information that has already been registered (see Article 10 of the FBG). The Austrian State can impose administrative sanctions in order to ensure that the information that requires declaration is communicated in its entirety in a timely fashion (Article 24 of the FBG). This is relevant because the vesting of rights and powers of coercion which derogate from ordinary law is an established indicator of the exercise of public powers. [31]

49. Moreover, this activity is directly linked to Austria's obligations under Directive 68/151, and particularly Article 3 thereof. It obliges Member States to maintain a central register, commercial register, or companies register. Article 3 further requires the Member States to ensure disclosure of, and reasonable access to, the information contained therein.

50. It should be noted that although private parties have the physical capacity to create, collect and commercialise business information data, they are not able to confer on it the legal status that characterises the data recorded in the official undertakings register; namely its opposability to third parties. [32] This legal effect can only be created by specific legal rules. The express purpose of public registers such as the undertakings register is to create a source of information that can be relied on in legal relations, and thereby provide the legal certainty necessary for exchange on the market.

24 — See *SAT Fluggesellschaft* v *Eurocontrol*, paragraph 18.

25 — See *Calì & Figli* v *Servizi Ecologici Porto di Genova*, paragraph 17.

26 — See *Calì & Figli* v *Servizi Ecologici Porto di Genova*, paragraph 18

27 — See *SAT Fluggesellschaft* v *Eurocontrol*, paragraphs 27 to 30; *Calì & Figli* v *Servizi Ecologici Porto di Genova*, paragraph 22; and C-113/07 P *Selex Sistemi Integrati* v *Commission*, paragraph 70.

28 — See *SAT Fluggesellschaft* v *Eurocontrol*, paragraph 28.

29 — See T–128/98 *Aéroports de Paris*, paragraph 107; C-82/01 P *Aéroports de Paris*, paragraph 79; Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, paragraph 25; Case C-437/09 *AG2R Prévoyance* [2011] ECR I-973, paragraph 42. Even if activity is carried out on a non-profit basis, there may still be relevant participation in a market. See the Opinion of Advocate General Maduro in *FENIN* v *Commission*, point 14; C-113/07 P *Selex Sistemi Integrati* v *Commission*, paragraph 115.

30 — See *Calì & Figli* v *Servizi Ecologici Porto di Genova*, paragraph 23; *SAT Fluggesellschaft* v *Eurocontrol*, paragraph 30.

31 — See *SAT Fluggesellschaft* v *Eurocontrol*, paragraph 24.

32 — See Article 3(5) of Directive 68/151.

3. Allowing inspection of the undertakings register

51. This activity too is unquestionably a public function. It is evident that public registers such as the undertakings register cannot fulfil their essential purpose, namely the creation of legal certainty through transparent availability of legally reliable information, unless access to them is provided to everybody.

52. As pointed out by the Netherlands Government, the fact that a fee is charged does not lead to the conclusion that an activity is economic. It is commonplace for activities that are clearly non-economic in their nature to have attached to them a service fee. A striking example of this consists of fees charged by courts or bailiffs. The fact that a public activity can be economically profitable for the public entity in question does not make it economic in nature.

53. Article 3(3), third subparagraph, of Directive 68/151 provides that the price for obtaining a copy of the companies register may not exceed the 'administrative cost'. According to both the written observations of the Commission and its oral submissions at the hearing, the Austrian State, by invoking its *sui generis* right in relation to the undertakings register data, is protecting its economic interests.

54. At present there is no evidence to the effect that the statutory court fee alone or together with the remuneration charged by the billing agencies would exceed the administrative cost of providing a copy of documents or particulars recorded in the undertakings register in the sense of Article 3(3) of Directive 68/151. If it were, the pricing system applied by Austria could be challenged in national courts or, at a general level, in infringement proceedings under Article 258 TFEU.

55. Even if allowing inspection and/or printouts of the undertakings register were considered to be an economic activity, it would be indivisible from the functions of collecting the data. Economic and public activities will be severable if the economic activity is not closely linked to the public activity, and the relationship between the two is merely indirect.[33] As Advocate General Maduro has observed, all cases which involve the exercise of official authority for the purpose of regulating the market, and not with a view to participating in it, fall outside the scope of competition law.[34] As is reflected, particularly, in the text of Article 3 of Directive 68/151, the maintenance of the undertakings register is inextricably bound up with securing reasonable access to it.

56. Moreover, contrary to arguments appearing in the written observations of the Commission, the fact that the billing agencies, who provide the pathway for public online access to the data in issue, do not enjoy coercive powers, along with the existence of some form of limited competition between these agencies,[35] does not detract from the indivisibility of accessing the data and collecting it. Further, the billing agencies are subject to State control through the supervision of the Ministry of Justice over the fees they are able to levy against users.[36]

33 — See C-113/07 P *Selex Sistemi Integrati* v *Commission*, paragraphs 76 and 77.

34 — See Advocate General Maduro's Opinion in *FENIN* v *Commission*, point 15.

35 — See *AOK-Bundesverband and Others*, paragraph 56.

36 — See *Calì & Figli* v *Servizi Ecologici Porto di Genova*, paragraph 24. That access to a public activity may depend on the use of 'gate-keepers' whose activity is economic in nature is demonstrated inter alia by provisions requiring that parties to court proceedings are represented by lawyers. See for example Article 19(3) of the Statute of the Court of Justice of the European Union.

4. Prohibiting re-use of information

57. Compass-Datenbank's case is novel, in the sense that it is grounded on an obligation on Austria to act, in order to comply with its obligations under Article 102 TFEU, rather than refrain from acting. Here it is useful to recall the limits on the obligations of the Member State to behave proactively in order to comply with their obligations under EU competition law. While there is a general obligation not to do anything to jeopardize the objectives of the Treaty, including competition policy,[37] the active obligations on Member States remain limited.

58. These principles were recently reiterated in *AG2R Prévoyance*,[38] where the Court recalled that Article 101 TFEU, read in conjunction with Article 4(3) TEU, requires the Member States not to introduce or maintain in force measures, whether legislative or regulatory, which may render ineffective the competition rules applicable to undertakings.[39] In addition, under Article 106(1) TFEU, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States may neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 TFEU and in Articles 101 TFEU to 109 TFEU, subject to Article 106(2) TFEU.[40]

59. Neither of these principles is helpful to Compass-Datenbank's case. The relevant provisions of Austrian law are not rendering EU competition rules ineffective. There is nothing in this line of case-law that goes so far as to compel a Member State to release data to economic operators, or otherwise facilitate the creation of new markets, in the absence of internal market measures that are designed to open up competition in industries that were traditionally run as State monopolies.[41]

60. Nor do the facts of this case correspond with those in which an undertaking has been granted special or exclusive rights. On the contrary, the prohibition on re-utilisation and commercialisation of the data kept on the undertakings register, beyond the activities of the billing agencies in providing the facility for online access to the database, applies to everybody, and not just Compass Datenbank. Indeed, as EU law currently stands, 'the maker of a database can reserve exclusive access to his database to himself or reserve access to specific people … or make that access subject to specific conditions, for example of a financial nature'.[42] As I have already mentioned, Directive 2003/98 'does not contain an obligation' on Member States 'to allow re-use of documents'.[43]

61. The Austrian, Netherlands, and Portuguese Governments also rely on Article 7 of Directive 96/9 on the legal protection of databases, and the *sui generis* right to protect that database.[44] However, in my opinion this is largely irrelevant to determining whether a prohibition on re-utilisation of data is a public or economic activity under Article 102 TFEU. It seems clear that public entities may invoke

37 — Case C-260/89 *ERT* [1991] ECR I-2925.

38 — Paragraphs 24 and 25.

39 — See, inter alia, *AGR2 Prévoyance*, paragraph 24; Joined Cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025, paragraph 65; Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121, paragraph 55.

40 — See *AGR2 Prévoyance*, paragraph 25.

41 — Such as, for example, occurred in the telecommunications sector.

42 — See Case C-304/07 *Directmedia Publishing* [2008] ECR I-7565, paragraph 52. See also Case C-203/02 *The British Horseracing Board and Others* [2004] ECR I-10415, paragraph 55. Both recital 47 and Article 13 of Directive 96/9 make it clear that the *sui generis* right is without prejudice to EU rules on inter alia abuse of a dominant position (see *Directmedia Publishing*, paragraph 56). However, as I have concluded that Austria has not engaged in economic activities that justify considering it an 'undertaking' under EU competition law, no question arises of prejudice to rules on EU competition law.

43 — See recital 9 of Directive 2003/98. See also Article 3 of Directive 2003/98, which makes it clear that the scope of application of the directive is limited to circumstances in which the Member State concerned has 'allowed', of its own free choice, 're-use of documents held by public sector bodies'. This points toward the prohibition on re-utilisation of data being a legitimate exercise of government policy, and thus a State function, rather than an economic activity.

44 — On the scope of the prohibition on re-utilisation without authorisation under Article 7 of Directive 96/9 see *British Horseracing Board and Others*, paragraph 61. With regards to guidance on the definition of a protected database, see *British Horse Racing Board* and Case C-46/02 *Fixtures Marketing* [2004] ECR I-10365.

their private law rights to protect their public tasks, such as prohibiting, as a landowner, trespassing on a military establishment. But the *sui generis* right comes into play in the context of the third preliminary question, in determining whether and when the owner of an intellectual property right can be compelled to issue a licence.

62. In conclusion, I propose that the Court should give a negative answer to the first and second preliminary questions.

C – *The third preliminary question*

63. Given that I have answered the first two preliminary questions in the negative, it is not necessary to answer the third preliminary question. However, I will make the following remarks that may be of assistance to the Court in the event that it decides that Austria has in fact been in engaged in an economic activity by collecting the data contained on the undertakings register, or making it available to the public, or both.

64. By this question the Court is asked to provide guidance on the principles laid down in the judgments in *Magill* and in *IMS Health* ('essential facilities doctrine'), and to consider their applicability when there is no 'upstream market' because the protected data are collected and stored in a database (the undertakings register) in the course of engagement in public activities. This question is relevant only if Austria is considered as having acted as an undertaking in the circumstances of the main proceedings.

65. It is necessary to start by identification of the upstream market.[45] This is so because the absence of dominance on this market will mean that there can be no abuse on the downstream market, which is sometimes termed the neighbouring or derivative market. In the case at hand there is a parallel market in online access to the raw data of the undertakings register through billing agencies, but there is no upstream market in bulk access to data of the undertakings register that is legally available for re-utilisation, and from which Compass-Datenbank could draw to produce an enriched product. Rather, what lie upstream are two functions; one that entails collection and registration of the data, and another which secures access thereto. The two cases that are essential to the resolution of this dispute, namely *Magill* and *IMS Health*, were quite different.

66. In *Magill* the undertakings found to have abused their dominant position by refusing to provide a licence over their programme schedules, thereby preventing the emergence of a market in comprehensive TV guides, were unquestionably dominant in the upstream market of information relating to TV programmes through a de facto monopoly over the information used to compile listings for television programmes.[46] This upstream dominance provided them with leverage in a potential downstream market in which potential competition lay. In *Magill*, RTE and ITP wanted to reserve the commercial exploitation of the programme schedules to their licensees acting in the upstream market to the exclusion of the emergence of the downstream market of comprehensive TV guides.

67. Similarly, in *IMS Health* the undertaking against whom a compulsory licence was sought was both engaged in an economic activity and dominant in the relevant market, namely the presentation to pharmaceutical companies of regional sales data concerning pharmaceutical products. Copyright protected 'brick structures', through which the undertaking presented the sales data, had become the industry standard and had put the undertaking in a dominant position. The Court observed that the refusal of the dominant undertaking to licence the brick structure to a competitor would involve

45 — See *IMS Health*, paragraph 45: '… it is determinative that two different stages of production may be identified and that they are interconnected, inasmuch as the upstream product is indispensable for the supply of the downstream product.'

46 — See *Magill*, paragraph 47.

abusive conduct in exceptional circumstances only.[47] What is required in all cases of exercise of an exclusive licence is satisfaction of three cumulative conditions: (i) the refusal is preventing the emergence of a new product for which there is a potential consumer demand; (ii) the refusal is unjustified; and (iii) the refusal is such as to exclude any competition on a secondary market.[48]

68. Returning to the case to hand, there is a lack of information in the order for reference on the relevant downstream market. We know that Compass-Datenbank wishes to commercialise and supplement the raw data of the undertakings register held by the Austrian State in the form of a developed business information service. But we know nothing about Compass-Datenbank's position on the market in such a developed service in key respects, such as its market share, and how this compares with the share of other players, if indeed they exist. As the Court has observed, 'the determination of the materially and geographically relevant market, and the calculation of the market shares held by the various undertakings operating on that market, constitute the starting-point of any appraisal of a situation in the light of competition law'.[49] If the Court is unable to make this assessment, it will declare the order for reference inadmissible.[50]

69. There is no information in the preliminary reference as to whether there are significant competitors to Compass-Datenbank who are offering business information services competing with Compass-Datenbank's database. If there are not, then Compass-Datenbank appears to have a dominant position, derived obviously from its historical position as the publisher of the *Zentralblatt*. Compass-Datenbank has also been able to receive the data it needs after the order of the Oberster Gerichtshof of 2002, the legal foundation of which is not explained in the order for reference, for a price that Austria considers too low. However, in the present litigation Compass-Datenbank is in essence seeking privileged access to the undertakings register data in economic and legal conditions that are more favourable than those applied to others. For these reasons there is certain factual indeterminacy in the case as to whether the alleged abuse relates to pricing, refusal to supply a service or access to an essential facility.

70. A further problem arises of determining what acts as the relevant essential facility held by the Austrian State. The two obvious candidates are the *sui generis* right to the data bank of the undertakings register or access to the not yet disclosed data of the undertakings register. In any event, the facility that has been denied cannot be access to the raw data as such because that is provided to everybody under non-discriminatory conditions through billing agencies.[51]

71. I have already concluded that a non-discriminatory prohibition on re-utilisation is an exercise of government policy, and one that is permitted by recital 9 and Article 3 of Directive 2003/98. However, it cannot be denied that Austria's refusal to supply fresh and up-to-date data and the prohibition on re-utilisation effectively prevents supply of a service for which there seems to be a demonstrable consumer demand. However, as Advocate General Jacobs observed in *Bronner*, an order requiring the issue of an intellectual property right, 'whether understood as an application of the essential facilities doctrine or, more traditionally, as a response to a refusal to supply goods or services, can be justified in terms of competition policy only in cases in which the dominant undertaking has a genuine stranglehold on the related market'.[52]

47 — See *IMS Health*, paragraph 35.

48 — See *IMS Health*, paragraph 38. More recently, see *Microsoft* v *Commission*, paragraphs 331 to 335, where the Court of First Instance provides a pithy summary of the law on refusal to issue a licence and on abuse of a dominant position.

49 — Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 27.

50 — See *Viacom Outdoor*, paragraph 29.

51 — In this sense the case is similar to Case T-504/93 *Tiercé Ladbroke* v *Commission* [1997] ECR II-923, paragraph 124 where the Court observed that no one had been granted any licence in the relevant geographic market so no discrimination had taken place. Here there is no discrimination because access to the business undertakings register is available to everyone via the billing agencies.

52 — See the Opinion of Advocate General Jacobs in *Bronner*, point 65.

72. Whether the refusal to deal and prohibition on re-utilisation in this case excludes any competition on the secondary market is doubtful. Theoretically, if the prohibition on re-utilisation were to be effectively enforced, which does not appear to have been the case so far, it would prevent the existence of the secondary market and in consequence any competition thereon, provided that re-utilisation of undertakings register data was indispensable, in the sense prescribed by the Court's case-law,[53] to the provision of any meaningful business information service concerning undertakings. However, the refusal to supply in the form of bulk access to fresh and up-to-date data is not, as such, capable of excluding competition on the secondary market. It only causes delays in presenting up-to-date products, such as the service provided by Compass-Datenbank, and increases the cost of their provision.

V – Conclusion

73. On the basis of the reasons presented above, I propose that the Court should answer the questions referred by the Oberster Gerichtshof as follows:

Article 102 TFEU is to be interpreted as meaning that a public authority does not act as an undertaking if it stores in a database (undertakings register) the information reported by businesses on the basis of statutory reporting obligations. Nor does such an authority act as an undertaking when it allows inspection and creation of printouts of the register, but prohibits any more extensive use of the data, whether in reliance on *sui generis* rights to protection as the maker of a database or on other grounds.

53 — See *Bronner*, paragraphs 41 to 46; *IMS Health*, paragraphs 28, 45 and 49.